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concerning Customs and related matters



and Decisions

of the United States Court of Appeals for
the Federal Circuit and the United
States Court of International Trade

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Classification: C91/244 Through C91/247

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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United States Court of International Trade

One Federal Plaza
New York, N.Y. 10007

Chief Judge

Judges

Gregory W. Carman*
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.

Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

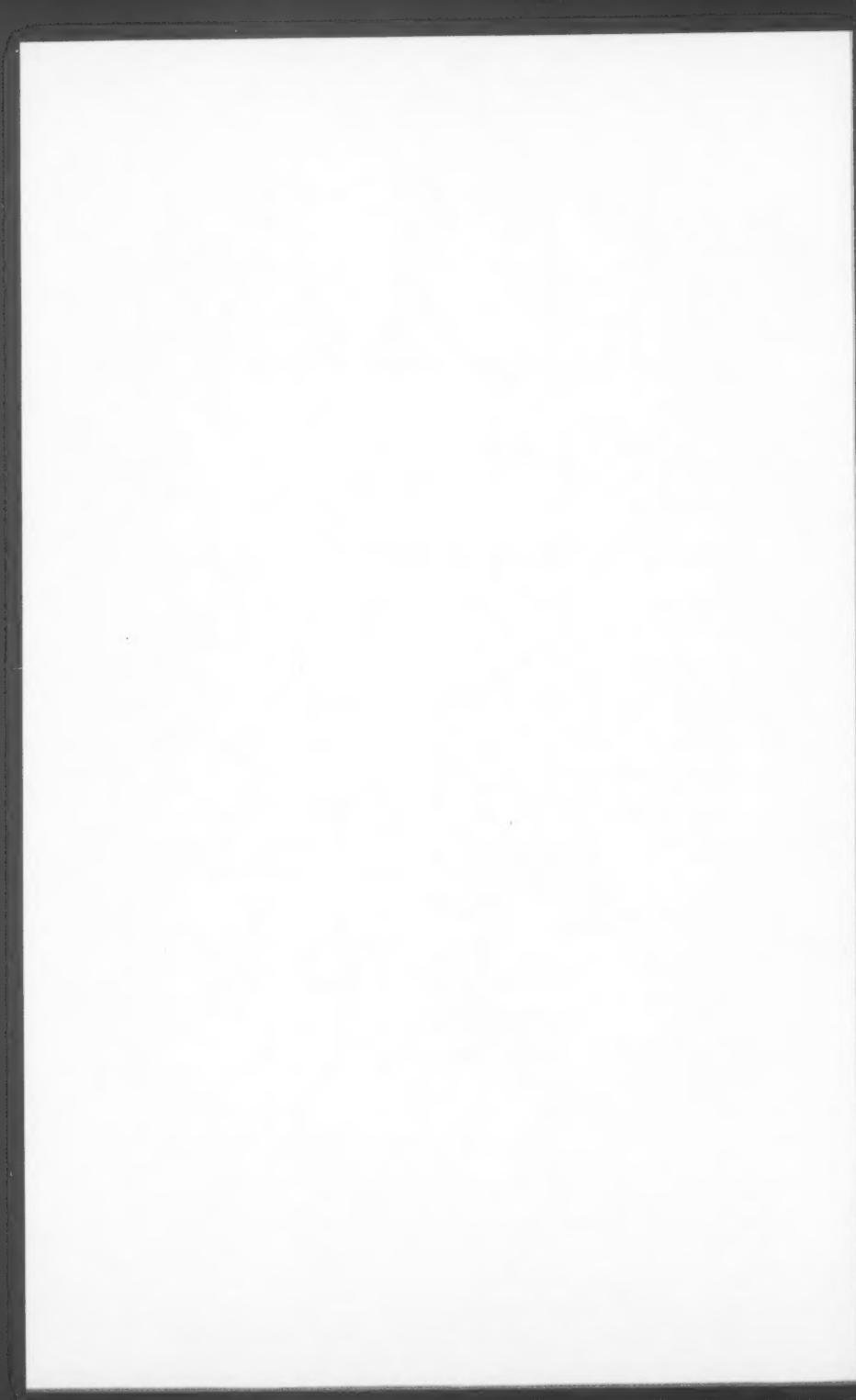
Senior Judges

Morgan Ford
James L. Watson
Herbert N. Maletz
Bernard Newman
Samuel M. Rosenstein
Nils A. Boe

Clerk

Joseph E. Lombardi

* Acting as Chief Judge, effective May 1, 1991, pursuant to 28 U.S.C. § 253d.



Decisions of the United States Court of International Trade

(Slip Op. 91-81)

TORRINGTON CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND
NTN BEARING CORP. OF AMERICA, ET AL., DEFENDANT-INTERVENORS

Court No. 91-05-00355

[Motion to strike granted.]

(Decided September 9, 1991)

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, Lane S. Hurewitz and Serena L. Wilson), for plaintiff.

James A. Toupin, Assistant General Counsel, *Marc A. Bernstein*, Office of General Counsel, United States International Trade Commission, for defendant.

Barnes, Richardson & Colburn (Robert E. Burke, Donald J. Unger, Brian F. Walsh and Michele E. McGuire), for NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Bearing Corporation of Canada and Tung Pei Industrial Co., Ltd., defendant-intervenors.

Bryan, Cave, McPheeters & McRoberts (Peter D. Ehrenhaft), for Magyar Gordulocsapagy Muvek, Impexmetal, Fabryka Lozysk Tocznych-Kielce and Fabryka Lozysk Tocznych-Krasnik, defendant-intervenors.

MEMORANDUM OPINION AND ORDER

DiCARLO, Judge: Plaintiff brings this action challenging the preliminary negative determinations of injury by the U.S. International Trade Commission in the antidumping and countervailing duty investigations of *Ball Bearings, Mounted or Unmounted, and Parts Thereof, from Argentina, Austria, Brazil, Canada, Hong Kong, Hungary, Mexico, the People's Republic of China, Poland, the Republic of Korea, Spain, Taiwan, Turkey, and Yugoslavia*, 56 Fed. Reg. 14, 534 (Int'l Trade Comm'n 1991) (neg. prelim.). The Court has jurisdiction under 19 U.S.C. § 1516a(a)(1)(C) (1988) and 28 U.S.C. § 1581(c) (1988).

Defendant-intervenors NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Bearing Corporation of Canada and Tung Pei Industrial Co., Ltd. ("NTN") seek to enlarge the scope of this action by interposing a cross-claim against ITC alleging plaintiff lacked standing to bring the antidumping petition. Defendant-intervenors Magyar Gordulocsapagy Muvek, Impexmetal, Fabryka Lozysk Tocznych-Kielce and Fabryka Lozysk Tocznych-Krasnik's ("MGM") have interposed an affirmative defense against ITC also alleging plaintiff lacked standing to bring the antidumping petition. Before the Court is plaintiff's motion to strike defendant-intervenors' claims. ITC supports plaintiff's motion.

NTN and MGM had not previously contested ITC's negative determination because they were prevailing parties at the administrative level. As a general rule, a prevailing party in an administrative proceeding may not appeal the proceeding only because it disagrees with some of the findings or reasoning. *Freeport Minerals Co. v. United States*, 3 Fed. Cir. (T) 114, 119, 758 F.2d 629, 634 (1985); *Rose Bearings, Ltd. v. United States*, 14 CIT ___, 751 F. Supp. 1545, 1547 (1990). While the Court is mindful of defendant-intervenors' arguments that they may sustain injury in the future if the Court remands this action and if ITC then reverses its preliminary negative determination, which could possibly lead to an antidumping order, the court has consistently held it lacks jurisdiction over a challenge to agency action went the challenge is made subsequent to the time for filing an action under 19 U.S.C. § 1516a(a). See, e.g. *Timken Co. v. United States*, 15 CIT ___, 758 F. Supp. 1518, 1520 (1991) (striking cross-claim); *Torrington Co. v. United States*, 14 CIT ___, 731 F. Supp. 1073, 1076 (1990) (striking affirmative defense); *Alhambra Foundry Co. Ltd. v. United States*, 12 CIT 343, 357, 658 F. Supp. 1252, 1263, *aff'd after further proceedings*, 12 CIT 1110, 701 F. Supp. 221 (1988) (denying defendant-intervenors' motion for remand of ITA's negative final antidumping determination). NTN and MGM did not commence actions to challenge ITC's determination, but assert their claims in their answers, which were filed outside the limitations period. Under the cases and statutory framework, the Court must grant plaintiff's motion to strike. Nonetheless, if the defendant-intervenors in the future suffer from a legally cognizable injury as the result of an adverse agency determination, they can commence an action pursuant to 28 U.S.C. § 1581(c) as provided in 19 U.S.C. § 1516a. See *Rose Bearings, Ltd. v. United States*, 14 CIT at ___, 751 F. Supp. at 1547; *Alhambra Foundry*, 12 CIT at 357, 685 F. Supp. at 1263.

CONCLUSION

This motion having been submitted to the Court and after due deliberation, it is

ORDERED plaintiff's motion to strike is granted.

(Slip Op. 91-82)

TORRINGTON CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, ROSE BEARINGS, LTD., RHP BEARINGS, RHP BEARINGS, INC., UNITED PRECISION INDUSTRIES, INA BEARING CO., INC., INA BEARING CO., LTD., SKF USA, INC., AB SKF, AND SKF (U.K.) LTD., DEFENDANT-INTERVENORS

Court No. 89-06-00311

Plaintiff contests the finding by the Department of Commerce, of five classes or kinds of merchandise in an investigation of antifriction bearings from the United Kingdom, and asserts that Commerce improperly modified the class or kind described in the petition.

Plaintiff also contests the ITA's decision to rescind the investigations of the cost of producing antifriction bearings in the United Kingdom.

Held: As a matter of law, the ITA possesses the authority to modify the petition's description of class or kind when it finds that the petition has described more than one class or kind of merchandise. Furthermore, the Court holds that Commerce's determination in the present action is supported by substantial evidence in the record.

The decision to rescind the cost of production investigations was within the authority of the ITA and was otherwise in accordance with law.

[ITA determination affirmed.]

(Dated September 11, 1991)

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., William A. Fennell and Wesley K. Caine) for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Jeanne E. Davidson*); of counsel: *John D. McInerney*, Senior Counsel, *Douglas S. Cohen*, *Craig R. Giese*, *Diane McDevitt*, *Stephanie J. Mitchell* and *Maria Solomon*, Attorney-Advisors, Office of the Chief Counsel for Import Administration, Department of Commerce, for defendant.

Tanaka Ritger & Middleton (*H. William Tanaka*, *Michele N. Tanaka* and *Michael J. Brown*) for *Rose Bearings, Ltd.*

Covington & Burling (*Harvey M. Applebaum* and *David R. Grace*) for *RHP Bearings, RHP Bearings, Inc.* and *United Precision Industries.*

Katten, Muchin, Zavis & Dombroff (*Thomas A. Rothwell, Jr.*, *Joseph A. Vicario, Jr.*, *James M. Lyons*, *Alfred G. Scholle* and *Callie Georgeann Pappas*) for *INA Bearing Company, Inc.* and *INA Bearing Company, Ltd.*

Hourey & Simon (*Paul Plaia, Jr.*, *Herbert C. Shelley*, *Joel D. Kaufman*, *Cecilia H. Gonzalez*, *Alice A. Kipel*, *Lauren D. Frank* and *Juliana M. Cofrancesco*) for *SKF USA, Inc.*, *AB SKF* and *SKF (U.K.) Limited.*

OPINION

TSOUCALAS, Judge: Plaintiff, The Torrington Company ("Torrington"), brings this action to challenge the final determination of the Department of Commerce, International Trade Administration ("Commerce" or "ITA") in the antidumping investigation of antifriction bearings from the United Kingdom ("UK"). *Final Determinations of Sales at Less Than Fair Value; Antifriction Bearings Other Than Spherical Plain Bearings and Tapered Roller Bearings* and *Parts Thereof From the United Kingdom, and Final Determination of Sales at Not Less Than Fair Value: Spherical Plain Bearings Parts Thereof From the United Kingdom*, 54 Fed. Reg. 19,120 (1989). Pursuant to Rule 56.1 of the rules of this Court, plaintiff seeks partial judgment upon the agency record regarding that part of the ITA's determination which stated that the petition encompassed five separate classes or kinds of antifriction bearings. Plaintiff also requests the Court to remand the case with directions that the ITA reinstitute those investigations of British costs of production which were rescinded.

DISCUSSION

A final antidumping determination by the Department of Commerce will be affirmed unless that determination is not supported by substantial evidence or is otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is relevant evidence that "a reasonable mind might accept as adequate to support a conclusion."

Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938); *Alhambra Foundry Co. v. United States*, 12 CIT 343, 345, 685 F. Supp. 1252, 1255 (1988) (citations omitted).

I. Class or Kind:

The facts of this case were set out in detail in *Torrington Co. v. United States*, 14 CIT ___, 745 F. Supp. 718, *aff'd*, No. 1020 (Fed. Cir. July 3, 1991). Briefly, while Torrington's petition described the subject merchandise as all ground antifriction bearings (except tapered roller bearings) and parts thereof, the ITA subdivided the merchandise into five classes or kinds: ball bearings, spherical roller bearings, cylindrical roller bearings, needle roller bearings and spherical plain bearings. 54 Fed. Reg. at 18,999. Plaintiff claims Commerce does not have the authority to modify the petition's description of "class or kind," but even if it did, its modification is not supported by substantial evidence in the record.

The Court adheres to its opinion in *Torrington* and finds that, as a matter of law, the ITA has the authority to subdivide the petition's class or kind description when necessary, and when there is substantial evidence to support the subdivision.

In the case at bar, plaintiff has attempted to prove that antifriction bearings are one class or kind by showing similarities among the various antifriction bearings within the framework of the criteria set forth in *Diversified Prods. Corp. v. United States*, 6 CIT 155, 162, 572 F. Supp. 883, 889 (1983).¹ The Court finds that the similarities among the bearings are outweighed by substantial evidence supporting the finding of five classes or kinds. See *Torrington*, 14 CIT at ___, 745 F. Supp. at 723-27. Accordingly, the determination of the ITA that antifriction bearings comprise five classes or kinds is affirmed.

II. Cost of Production:

Plaintiff also contends that the ITA improperly rescinded investigations of the British respondents' costs of production ("COP"). The Tariff Act of 1930, as amended, 19 U.S.C. § 1677b(b) (1988), provides that, if the ITA "has reasonable grounds to believe or suspect that sales in the home market of the country of exportation * * * have been made at prices which represent less than the cost of producing the merchandise in question, * * * such sales shall be disregarded in the determination of foreign market value." A cost of production investigation may be initiated at the request of the petitioner if the petitioner files its request in a timely manner and the information supporting the request meets statutory and judicial standards. 19 U.S.C. § 1677b(b); *Floral Trade Council of Davis, Cal. v. United States*, 12 CIT 981, 982, 698 F. Supp. 925, 926 (1988); *Al Tech Specialty Steel Corp. v. United States*, 6 CIT 245, 247-48, 575 F. Supp. 1277, 1280 (1983), *aff'd*, 745 F.2d 632 (Fed. Cir. 1984).

¹ The criteria include the general physical characteristics of the merchandise, the expectations of the ultimate purchasers, channels of trade in which the goods travel, the ultimate use of the product, and its cost. *Id.*

In its petition, Torrington alleged that sales in the home markets of the British manufacturers of antifriction bearings ("AFBs") were being made at prices below the cost of production. Administrative Record ("AR") (Pub.) Doc. 1 at 108-10. On the basis of the petition's allegations, the ITA initiated an investigation as to the cost of producing AFBs in the UK. The foreign manufacturers, however, objected based on the fact that Torrington's allegations relied on country-wide data, rather than the company-specific information required by this court in *Al Tech*. Commerce concurred and on July 22, 1988, commerce asked Torrington to supplement its submissions. AR (Pub.) Doc. 120.

When Torrington's supplements still did not satisfy the statutory and *Al Tech* standards, commerce rescinded the COP investigations in each of the five classes or kinds of bearings as to all the foreign manufacturers. See AR (Pub.) Doc. 160. However, Commerce provided Torrington with an opportunity to submit revised cost allegations which would be acceptable. *Id.* at 5; AR (Pub.) Doc. 164 at 2-3. The petitioner did submit additional data within the ITA's stated deadline, and commerce then reinstituted the COP investigations covering ball bearings and spherical roller bearings manufactured by SKF in the UK, and needle roller bearings made by INA in the UK. 53 Fed. Reg. at 45,314. However, Commerce did not reinstitute the investigation regarding cylindrical roller bearings manufactured by RHP in the UK.

Plaintiff argues that Commerce applied an overly onerous standard for initiation of the COP investigation. Since the statute calls for an investigation whenever the ITA has "reasonable grounds" for believing that sales in the home market were made below cost, plaintiff asserts the standard is a relatively easy one to meet and may be satisfied by country-wide allegations of below cost sales. In support, Torrington cites *Connors Steel Co. v. United States*, 2 CIT 242, 527 F. Supp. 350 (1981), wherein this court held that the ITA had a duty to investigate the foreign manufacturers' costs even though the petitioner had not submitted evidence directly from the specific producer's costs.

The court in *Connors Steel* held that it could be "unreasonable to expect a party to produce data directly from the costs of production of a competitor." 2 CIT at 247, 527 F. Supp. at 356. Certainly, there can be no argument on that point, particularly where that data is confidential and in the exclusive control of the competitor. The issue in this case is not whether Torrington's allegations were based on competitor's costs, but rather whether the allegations should have been made against specific competitors rather than against entire nations. Many of the producers in this case manufacture bearings in more than one country. Therefore, apparently to ease its burden, the petitioner chose to allege below cost sales against particular countries instead of particular producers. Initially, the ITA acquiesced in this methodology, but later reverted to the company-specific standard when foreign manufacturers protested the more lenient criteria.

Commerce relies on this court's opinion in *Al Tech* to support its application of the more demanding company-specific standard for initiation of a COP investigation. In *Al Tech*, the court rejected the evidence presented by plaintiff as reasonable grounds to support initiation of a COP investigation because the information was "much too general in nature." 6 CIT at 247, 575 F. Supp. at 1280. That evidence consisted of a foreign steel industry press release, a European Commission paper, a series of antidumping and countervailing duty petitions filed against producers of different products and two American trade papers. 6 CIT at 248, 575 F. Supp. at 1281. The court found the evidence "entirely too remote and generalized to give rise to a reasonable suspicion of below-cost-of-production sales." 6 CIT at 250, 575 F. Supp. at 1282. Furthermore, the court explained that "absent a *specific* and *objective* basis for suspecting that a *particular* foreign firm is engaged in home market sales at prices below its cost of production, section 773(b)'s threshold requirement of 'reasonable grounds to believe or suspect' has not been satisfied." *Id.* (Emphasis in original.)

In the case at bar, Torrington based its allegations on its own costs of production adjusted for the wage rate, material and overhead costs, financing charges and general selling and administrative expenses in the UK. However, Torrington did not explain why every antifriiction bearing manufacturers in the UK would have identical costs, except to say that all the producers charge substantially identical prices. AR (Pub.) Doc. 180 at 38-39. This does not constitute evidence of even similar costs, since producers may charge identical prices merely to obtain a share of the market, though their costs may be significantly higher. Indeed, the prevention of such predatory pricing is precisely why the antidumping laws exist.

The country-wide data submitted by Torrington was too general to constitute "reasonable grounds to believe or suspect" that the home market sales of *particular* producers were at prices below the cost of production. The court in *Al Tech* clearly required that petitioners submit specific and objective evidence that particular producers were selling below cost in their home markets, and the Court sees no reason to diverge from that precedent.

In addition, the statute's requirement of "reasonable grounds" does not imply, as plaintiff claims, that initiation of a cost investigation should be no more difficult than initiation of the principal investigation itself. Initiation of an antidumping proceeding requires a facially sufficient petition supported by information "reasonably available to the petitioner." 19 U.S.C. § 1673a(b)(1) (1988). The section's legislative history indicates that Congress intended that Commerce decline to initiate investigations only where they are "clearly frivolous" or where the petitioner has not provided information reasonably available to it. H.R. Rep. No. 317, 96th Cong., 1st Sess. 51 (1979); S. Rep. No. 249, 96th Cong., 1st Sess. 63, reprinted in 1979 U.S. Code Cong. and Admin. News 381, 449.

By contrast, a cost investigation will be initiated only where *Commerce* has reasonable grounds to suspect that a respondent is selling below cost. There is no correlation between what constitutes reasonable grounds to the ITA, and what constitutes information reasonably available to the petitioner. Indeed, the information which is reasonably available to a particular petitioner can be substantially more or less consequential than what Commerce would consider reasonable grounds, depending on how resourceful the petitioner may be. Hence, the relative rigor of the standard will vary from case to case.

Torrington also argues that the ITA's application of the company-specific standard was improper in that it was a deviation from ITA precedent. Whereas in the past the ITA has instituted COP investigations based on country-wide allegations of below cost sales, in this case the agency demanded that Torrington provide company-specific and product-specific data.

It is a principle of administrative law that an "agency must either conform to its prior norms and decisions or explain the reason for its departure from such precedent." *Mississippi Valley Gas Co. v. Federal Energy Regulatory Comm'n*, 659 F.2d 488, 506 (5th Cir. 1981); see also *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971). However, an agency is "not bound to rigid adherence to precedent" where the public interest and the pursuit of justice require deviation from prior holdings. *McHenry v. Bond*, 668 F.2d 1185, 1192 (11th Cir. 1982).

The ITA acknowledges that it veered away from past practice in this case but asserts that it provided a good reason for doing so. *Defendant's Second Memorandum in Opposition to Plaintiffs' Motions for Partial Judgment Upon the Agency Record Regarding Certain Fundamental Issues* at 63. Specifically, the Government states that its interpretation of the statute regarding initiation of COP investigations changed after the ruling of this court in *Al Tech*. See AR (Pub.) Doc. 160 at 5. This constitutes sufficient reason for the ITA's departure from precedent.

Accordingly, the Court finds that the ITA's decision to rescind the cost of production investigations of all five classes or kinds of bearings from the United Kingdom because no company-specific data was provided was in accordance with law, and it is therefore affirmed.

Finally, Torrington contests the ITA's decision not to reinstitute the investigation of RHP's cylindrical roller bearings manufactured in the UK after supplemental information on costs was submitted. The ITA indicated that this COP investigation was not reinstituted because Torrington's revised cost allegations did not set forth company-specific sales data such as price. The record indicates that Torrington submitted extensive cost data on RHP's ball bearings, but not on cylindrical roller bearings. See United Kingdom Record (Conf.) Doc. 65. Since cost allegations must include data on the particular product at issue, the Court finds no error in the ITA's decision not to reinstitute the investigation of RHP's cylindrical roller bearings.

CONCLUSION

The decision of the ITA to subdivide the petition's class or kind description of antifriction bearings into five classes or kinds was in accordance with law and is affirmed.

The decision of the ITA to rescind the investigations of the UK respondents' costs of production was in accordance with law and is affirmed.

(Slip Op. 91-83)

BEEKMAN PAPER CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 86-03-00345

[Plaintiff moves for summary judgment on issue of classification of paper used in photocopy machines, based on this Court's prior holdings that photocopying is a photographic process.]

Held: Plaintiff's motion is denied as substantial factual issues remain to be decided.]

(Dated September 12, 1991)

Soller, Singer and Horn, (Gerald B. Horn and Ellen L. Federman), for plaintiff.

Stuart M. Gerson, Assistant Attorney General, Joseph I. Liebman, Attorney in Charge, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, (Barbara M. Epstein), (Chi Choy, General Attorney, U.S. Customs Service, International Trade Litigation, Of Counsel) for defendant).

MEMORANDUM OPINION AND ORDER

I. Introduction:

MUSGRAVE, *Judge*: This case comes before the Court on plaintiff's motion for summary judgment. Plaintiff Beekman Paper Company ("Beekman") imported paper used in photocopying (also known as "BPF paper"), which was classified under Tariff Item 256.20, TSUS, as "writing paper." Plaintiff Beekman claims that the paper is correctly classifiable under Tariff Item 252.05, TSUS, as "basic paper to be sensitized for use in photography."¹ Plaintiff argues that summary judgment should be granted because this case falls precisely under two prior cases which decided that photocopying is a photographic process. However, because there are significant questions of fact remaining, plaintiff's motion is denied.

¹ Plaintiff also claims that the paper is classifiable under Tariff Item 256.13, TSUS, as "basic paper to be sensitized for use in photography" which is cut to size or shape. Plaintiff's Memorandum of Facts and Law in Support of its Motion for Summary Judgment, ("Plaintiff's Memo") at 2, Defendant's Memorandum in Support of Its Opposition to Plaintiff's Motion for Summary Judgment ("Defendant's Opposition"), at 3, fn. 3.

II. *Although Photocopying is a Form of Photography, Factual Issues Remain:*

Plaintiff argues that this paper should be classified as photocopy paper because *Tomoeagawa U.S.A., Inc. v. United States*, 12 C.I.T. 112, 681 F. Supp. 867 (1988), *aff'd in part and vacated in part*, 7 Fed. Cir. (T) 29, 861 F.2d 1275 (1988), and *St. Regis Paper Co. v. United States*, 11 C.I.T. 601 (1987), establish that photocopying is analogous to photography for the purposes of classification. Plaintiff argues that the paper should be reclassified under Tariff Item 256.13, TSUS, as paper to be sensitized for use in photography, because it is made for use in photocopying machines.

This Court decided in *St. Regis* that black calendared paper used to transfer an image to copy paper inside a Pitney-Bowes copy machine was classifiable under Tariff Item 252.05, TSUS, as basic paper to be sensitized for use in photography. Customs had originally classified it as "paper, not impregnated, not coated, not surface-colored, not embossed, not ruled, not lined, not printed, and not decorated: weighing over 18 pounds per ream: other," at a duty rate of 10 per cent *ad valorem*. Tariff Item 252.90, TSUS.

The *St. Regis* case stands mainly for the proposition that photocopying is a form of photography for the purposes of the tariff schedules. It does not hold that copy paper is paper to be sensitized for use in photography. *St. Regis* dealt with paper that is a step removed from the copy paper herein. The *St. Regis* dealt with paper that is a step removed from the copy paper herein. The *St. Regis* paper was permanently installed in the machine to perform the task often done by the "drum" in other machines, where it was exposed to a reflected image of the page being copied. Because the paper was sensitized with zinc oxide, the electrical charge it carried dissipated where there was text on the original. This electrical image was then coated with toner, which stuck only in negatively charged areas. Positively charged copy paper was then rolled against the photomaster, thus transferring the image. The copy paper was then heated and compressed to permanently fuse the toner to the paper.

The *Tomoeagawa* case held that toners and developers used in electrophotographic process were properly classifiable as photographic chemicals, under Tariff Item 405.20, TSUS.

Toner and developer are clearly chemicals, and plaintiff has conceded this point by arguing that developer, which contains toner as an active ingredient, is alternatively classifiable under item 432.20 or 432.25, TSUS, as chemical mixtures not specially provided for. It is clear therefore, that toner and developer are chemicals utilized in a photographic process.

Tomoeagawa, 681 F. Supp. at 874.

Plaintiff argues that under *Tomoeagawa* photocopying is a photographic process, therefore the BPF copy paper is photographic paper. Defendant concedes that photocopying is a form of photography, but

argues that there are significant factual issues remaining. The government argues that although *St. Regis* held that photocopying is a form of photography for the purpose of the "photomaster" paper at issue there, the BPF paper imported by Beekman is not analogous to the *St. Regis* photomaster paper.

III. Whether the BPF Paper is Sensitized Remains to be Decided:

Defendant argues that summary judgment should not be granted because issues remain concerning whether the paper is "sensitized" and what that term implies in this context. Defendant's definition of sensitization differs significantly from plaintiff's. The government contends that the term, as used in both conventional (silver halide) photography, and photocopying, refers to the process of making a sheet of paper photo-sensitive, or sensitive to light or other forms of radiant energy, and that the BPF paper is not sensitized. Defendant's Opposition, at 11-14.

This contrasts significantly with Beekman's assertion that the BPF paper is sensitized by an electrical charge just before it is exposed to the toner-laden drum. The issue of sensitization is material to this case, as sensitization is one of the distinguishing features of Tariff Item 252.05, TSUS ("basic paper to be sensitized for use in photography"). Plaintiff's proposed definition of sensitization does not convince the Court that the BPF paper fits snugly within the *St. Regis* case.

Defendant's Opposition brief is buttressed by two affidavits from copy paper experts, a technical service manager at Xerox Corp. and a Customs special assistant in the office of Laboratories and Scientific Services. The experts assert that the BPF paper is not sensitized. They also question whether the paper is absorbent enough to accept ink, as alleged by plaintiff. Plaintiff argues that those affidavits "are replete with statements using [the terms at issue here] loosely, in a general sense, as if that were determinative of a tariff meaning different from that which had already been assigned to these terms by this Court." Plaintiff's Reply, at 2. However, those statements, along with this Court's analysis, are sufficient to raise significant questions of material fact.

IV. Summary Judgment:

On a motion for summary judgment, there may be no genuine issues of material fact in dispute, as the Court cannot try issues of fact. *Carter Footwear v. United States*, 10 C.I.T. 618 (1986); Wright, Law of Federal Courts § 99 at 664 (4th ed. 1983) (court may only determine whether there are issues to be tried). Summary judgment may be inappropriate where the parties agree on the basic facts, but disagree about the factual inferences to be drawn from those facts; if reasonable minds differ on the inferences arising from undisputed facts, then the court should deny summary judgment. *Warrior Tombigbee Transportation Co. v. M/V Nan Fung*, 695 F.2d 1294, 1296-97 (11th Cir. 1983); *Mitsui Foods, Inc. v. United States*, 12 C.I.T. 276, 278, 688 F. Supp. 605, 606 (1988), *aff'd*, 7 Fed. Cir. (T) 36, 867 F.2d 1401 (1989). In addition, the party against whom the motion is made is entitled to all the favorable inferences that may be

reasonably drawn from the evidence, and if when so reasonably viewed reasonable minds might reach different conclusions, the motion should be denied. *Caylor v. Virden*, 217 F.2d 739 (8th Cir. 1955).

On the undisputed facts before the Court, there remains a significant question of the inference to be drawn from the fact that the BPF paper is electrically charged as it enters the paper path inside a photocopy machine. Giving the government's affidavits the weight they are due, the Court finds that reasonable minds might differ as to whether the paper is thus "sensitized" or not. As a result, summary judgment is plaintiff's favor would be inappropriate.

V. Conclusion:

After examining the evidence and law presented to support the motion for summary judgment, this Court believes that the factual issue of whether the BPF paper is "sensitized" within the meaning of the TSUS and the *St. Regis* case remains to be decided. There are significant differences between the two types of paper, their uses, and the sensitizations used. The papers are not alike, so this case does not fit snugly within the *St. Regis* holding. Also, although *Tomoegawa* holds that photocopying is a form of photography, it does not necessarily follow that copy paper is photographic paper. Finally, plaintiff has inconclusively argues that the BPF paper's chief use is in photocopying. Paper similar to the BPF paper is widely used for laser printing, for example. Whether the chief use of BPF paper is copying has not been decided. For these reasons, plaintiff's motion for summary judgment is **DENIED**.

ABSTRACTED CLASS

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSE
C91/244 9/6/91 Musgrave, J.	Canon USA, Inc.	89-2-00064	389.62 9%
C91/245 9/6/91 Musgrave, J.	Sears, Roebuck & Co.	83-3-00397	700.45 10%
C91/246 8/9/91 Aquilino, J.	Delta Impex Watch Corp.	83-1-00040	716.09-7 715.05 Variou
C91/247 9/9/91 Aquilino, J.	Jawhar Trading Corp.	83-8-01246	716.09-7 716.05 Variou

CLASSIFICATION DECISIONS

CLASSIFIED	HOLD	BASIS	PORT OF ENTRY AND MERCHANDISE
	676.50 4%	Agreed statement of facts	New York Typewriter ribbon spools
	700.45 10%	Mitsubishi Int'l Corp. v. U.S., S.O. 87-136 (1987)	Chicago Footwear
716.45, 5, etc., us rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. v. U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. v. U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
716.45, 5, etc., us rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. v. U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. v. U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

ABSTRACTED VALUATION D

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	BASIS OF VALUATION	
V91/11 9/6/91 Musgrave, J.	Monarch Luggage Corp.	86-6-00727	Transaction value	

DECISIONS

HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
F.o.b. values set forth on the commercial invoices attached to the entry papers, excluding the value of the buying commissions	Agreed statement of facts	New York Luggage



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